



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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March 2, 1993

MEMORANDUM

TO: The Commission

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

N. Bradley Litchfield
Associate General Counsel

Jonathan M. Levin
Senior Attorney

**SUBMITTED LATE
AGENDA ITEM**
For Meeting of: MAR 4 1993

SUBJECT: Draft AO 1993-2

On February 25, 1993, the Commission considered two drafts of the subject advisory opinion. These were the draft presented by the Office of General Counsel (Agenda Document #93-20), and the draft presented by Commissioner Elliott (Agenda Document #93-20-A). After discussion of these drafts, the Commission approved a motion to return Agenda Document #93-20 to the Office of General Counsel to incorporate some of Agenda Document #93-20-A.

This office has attached two new drafts. The first draft, Draft A, incorporates some of the language pertaining to Advisory Opinions 1985-14 and 1984-15 presented in Agenda Document #93-20-A. The second draft, Draft B, is an attempt to reach consensus among the Commissioners by excising much of the legal analysis presented in the agenda documents. Marginal notations on the draft indicate where language has been added, modified, or deleted from Agenda Document #93-20.

Draft A is an attempt to bring together two theories, as directed by the Commission, in one document. The two theories, however, have mutual inconsistencies. The Office of General Counsel recommends Draft B which reaches the same result with a minimum amount of legal analysis and leaves each Commissioner's office free to write a concurring opinion.

We request that these two drafts be placed on the agenda for March 4, 1993.

Attachments

1 DRAFT A

2
3 ADVISORY OPINION 1993-2

4 Robert F. Bauer
5 Perkins Coie
6 607 Fourteenth Street, N.W.
Washington, D.C. 20005-2011

DRAFT

7 Dear Mr. Bauer:

8 This responds to your letter dated January 29, 1993,
9 requesting an advisory opinion on behalf of the Democratic
10 Senatorial Campaign Committee ("the DSCC") concerning the
11 application of the Federal Election Campaign Act of 1971, as
12 amended ("the Act"), and Commission regulations to the
13 application of party coordinated expenditure limits to a
14 special Senatorial election together with any run-off.

15 After Senator Lloyd Bentsen's nomination as Secretary of
16 the Treasury in December 1992, the Governor of Texas
17 appointed an individual as an interim Senator until a special
18 election is held. Candidates from all parties, including any
19 independents, will compete in this election. Under Texas
20 law, if no candidate receives a majority of votes in the
21 special election, a run-off between the top two finishers
22 will occur to determine who will hold the seat. See Election
23 Code §§ 2.021, 2.023, 203.003, and 204.005. The winner will
24 serve out the balance of Senator Bentsen's term, which
25 expires in January 1995. The special election has been
26 scheduled for May 1, 1993.

27 The DSCC, as agent for the State Democratic Committee of
28 Texas and the Democratic National Committee, will make
29 coordinated expenditures in connection with the impending
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4 Texas Senate race pursuant to 2 U.S.C. §441a(d)(3). In view
5 of the possibility that there will be a run-off, you ask
6 whether, under section 441a(d), there is a single expenditure
7 limitation on parties supporting candidates in a special
8 election or, in the alternative, a separate limit for a
9 run-off.

10 The Act and regulations provide that political party
11 committees may make limited expenditures in connection with
12 the general election campaign of candidates for Federal
13 office. 2 U.S.C. §441a(d)(1); 11 CFR 110.7(b)(1). The
14 national party committee (including any designated agent of
15 the national committee) and state political party committee
16 (including subordinate state committees) may each make
17 expenditures in connection with the general election campaign
18 of a Senatorial candidate in that state who is affiliated
19 with such party. 2 U.S.C. §441a(d)(3); 11 CFR 110.7(b)(1)
20 and 110.7(a)(4). These two limits (one for the national and
21 one for the state) are set by a formula contained in the Act
22 based on voting age population of the state. 2 U.S.C.
23 §441a(d)(3)(A) and 441a(c); 11 CFR 110.7(b)(2)(i) and (c),
24 and 110.9(c).

25 The Act defines "election" to include a general
26 election, but does not separately define the term "general
27 election." See 2 U.S.C. §431(1). Commission regulations,
28 however, define "general election" to include an election
29 which is held to fill a vacancy in a Federal office and which
30 is intended to result in the final selection of a single

3 individual to the office at stake. 11 CFR 100.2(b)(2). The
4 regulations also provide that a special election is held to
5 fill a vacancy and may be a primary, general, or run-off
6 election.

7 The Commission has previously addressed the question of
8 whether a run-off following a special general election would
9 be considered a separate general election or a continuation
10 of the general election for the purposes of 2 U.S.C.
11 §441a(d). Advisory Opinion 1983-16. In that situation, the
12 State of California held a "special primary" to fill a
13 vacancy for a House seat. Under California law, all
14 candidates of whatever affiliation ran against each other.
15 If any candidate received a majority, he or she was declared
16 the winner. If no candidate received a majority, a
17 subsequent election was held and the candidates were limited
18 to the top vote getter in each "political party or political
19 body." The Commission determined that the first election,
20 although it was labeled a "special primary" and could be
21 followed by a run-off, fit the definition of "general
22 election" because it was held to fill a vacancy in a Federal
23 office (i.e., a special election) and was intended to result
24 in a final selection of a single individual. 11 CFR
25 100.2(b)(2). The Commission noted that this was consistent
26 with a conclusion of a California appellate court in a 1978
27 decision.

28 The Commission also concluded that, in view of the
29 circumstances of the special election process in California,
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4 the run-off could be viewed as a continuation of the general
5 election campaign which began in connection with the first
6 election.^{1/} The Commission further stated, however, that the
7 run-off was not a separate or additional general election
8 allowing for a new §441a(d) limit, and that only a single set
9 of §441a(d) limits was allowable. The Commission noted that,
10 under Commission regulations, an election is classified
11 according to one type only. See 11 CFR 100.2. With respect
12 to special elections, no provision is made for characterizing
13 the same election as both a general and a run-off election.
14 See 11 CFR 100.2(f). Thus, only one section 441a(d) limit
15 was available, but it could be utilized for both the first
and second elections, i.e., the general and the run-off.

16
17 The Commission concludes that there is no practical
18 difference between the situation presented in Advisory
19 Opinion 1983-16 and the situation presented in Texas. Thus,
20 there will be one section 441a(d) limitation applicable to
21 the special election together with any run-off. The special
22 election scheduled for May 1 is a general election under 11
23 CFR 100.2(b)(2), i.e., it is being held to fill a vacancy in
24 a Federal office and is intended to result in the final
25 selection of a single individual to the office. The possible
26 run-off election fits the definition distinguishing run-offs
27 from general elections, i.e., "[t]he election held after a

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29
30 ^{1/} The most significant circumstance was that, although
there was a possibility that the first election would select
an officeholder, there remained the possibility that a
subsequent election would be needed.

3 general election and prescribed by applicable State law as
4 the means for deciding which candidate should be certified as
5 officeholder elect." 11 CFR 100.2(d)(2).

6 In addition to considering an initial special election
7 to be a general election, an alternative method of analyzing
8 the special elections in Texas may exist. The preliminary
9 special election in Texas may be viewed as a primary election
10 if it has the practical effect of narrowing many candidates
11 down to two nominees. These nominees would participate in a
12 subsequent "general" election that is "intended to result in
13 the final selection of a single individual." 11 CFR
14 100.2(b)(2). Political parties would still be able to make
15 coordinated expenditures during the first election, even if
16 it is considered a primary, since the Commission has
17 concluded that §441a(d)(3) expenditures may be made before
18 the party's general election candidates are nominated.
19 Advisory Opinion 1985-14. See also Advisory Opinion 1984-15.

20 As noted in Advisory Opinion 1983-16, the Commission's
21 conclusion does not change the status of the run-off election
22 as a separate election for the purposes of the contribution
23 limits in 2 U.S.C. §441a(a). These limits apply with respect
24 to "any election" or "each election," and do not relate
25 specifically to the determination of what constitutes a
26 general election or a "general election campaign" for the
27 purposes of section 441a(d). Compare 2 U.S.C. §441a(a)(1),
28 (2), and (6), to 2 U.S.C. §441a(d).

29 The legislative history of the Act further supports the
30

Insert
from
#93-20-A.

modified
language
underlined

changed
from
"this"

3
4 separate treatment and interpretation given to contribution
5 limits under 2 U.S.C. §441a(a) and coordinated expenditure
6 limits under 2 U.S.C. §441a(d). The Conference report for
7 the 1976 amendments explains section 441a(d) as follows:

8 This limited permission allows the political
9 parties to make contributions in kind by spending
10 money for certain functions to aid the individual
11 candidates who represent the party during the
12 election process. Thus, but for this subsection,
13 these expenditures would be covered by the
14 contribution limitations stated in subsections
15 (a)(1) [section 441a(a)(1)] and (a)(2) [441a(a)(2)]
16 of this provision.

17 H.R. Rep. No. 1057, 94th Cong., 2d Sess. 59 (1976). This
18 explanation separates the limited permission of party
19 expenditures in 2 U.S.C. §441a(d) from the contribution
20 limitations of 2 U.S.C. §441a(a). Furthermore, it indicates
21 that section 441a(d), unlike section 441a(a), addresses the
22 election process, rather than specific selection points
23 within the process. See 11 CFR 110.1(b)(2), (b)(3)(i), and
24 (j)(1); 110.2(b)(2), (b)(3)(i), and (i)(1). The election
25 process always has a single general election and the process
26 may entail other elections either before or after the general
27 election; e.g., nominating convention, popular primary,
28 post-primary or post-general run-offs. All of these are
29 focused on the general election, either as a means to narrow
30 the field before the general election, or afterwards, if the
31 general election is inconclusive. See Advisory Opinion] added
32 1983-16.

33 This response constitutes an advisory opinion concerning
34 application of the Act, or regulations prescribed by the
35

3 Commission, to the specific transaction or activity set forth
4 in your request. See 2 U.S.C. §437f.

5 Sincerely,

6
7 Scott E. Thomas
8 Chairman

9 Enclosures (AOs 1985-14, 1984-15, and 1983-16)

added